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**Supreme Court of the United States**

OCTOBER TERM, 1962. <sup>3</sup>

Nos. ~~8~~ 79

2,872.88 ACRES OF LAND, MORE OR LESS, SITUATE  
IN CLAY AND QUITMAN COUNTIES, STATE OF  
GEORGIA, AND FRANK HUMBER, ET AL., AND  
UNKNOWN OWNERS,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

1,361.09 ACRES OF LAND, MORE OR LESS, SITUATE  
IN CLAY COUNTY, STATE OF GEORGIA, AND  
CAROLYN GAVIN GIBSON, ET AL., AND UN-  
KNOWN OWNERS,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT.**

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Petitioners, Hoke S. Lindsey (Tract No. H-805 et al.),  
A. J. Watson (Tract No. M-1306 et al.), and Carolyn  
Gavin Gibson, Edward M. Gavin, James F. Gavin, and  
Chester Gavin, Jr. (Tract No. B-201 et al.), pray that

the writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above cases on December 5, 1962, and the order denying the Petitioners' Petition for Rehearing entered in the above cases on January 3, 1963.

### **OPINIONS BELOW.**

The District Court rendered no opinion in the cases. It adopted the Commission's reports in the three cases. The opinion of the Court of Appeals for the Fifth Circuit (R. 114-123) reported at 310 Fed. 2nd 775 and a copy of the opinion is incorporated in the Appendix hereto, at page 38.

### **JURISDICTION.**

The judgments of the United States Court of Appeals for the Fifth Circuit were entered on December 5, 1962, and a copy of judgments are appended to this Petition in the Appendix at pages 49 and 51. Petitioners' Petition for Rehearing (Appendix, page 53) was denied by order of said Court on January 3, 1963, and a copy of the judgment denying the rehearing is likewise set forth in the Appendix hereto at page 61. On January 15, 1963, the Court of Appeals for the Fifth Circuit entered an order granting a stay of the mandate of that Court for a period of sixty (60) days from that date to enable Petitioners to apply for a writ of certiorari from this Court. A copy of the order granting this stay is set forth in the Appendix hereto at page 63. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

### QUESTIONS PRESENTED.

(a) Succinctly stated, whether a master is required to state what evidence he credited or discredited, but expressed in the terms and circumstances of the case, it is whether adequate findings of fact under Rules 52.(a) and 53 (e) (1) (2) of the Federal Rules of Civil Procedure require a condemnation commission appointed under Rule 71A (h) affirmatively to find which evidence it credited and which evidence it discredited, the degree to which it based its findings upon opinions based on knowledge of comparable sales, whether particular evidentiary sales were truly comparable, whether its ultimate award of value was based on comparable sales, or on opinion evidence, or whether its award was a scaling down of an opinion based on a claimed misconception of market value, where the commission's reports contained a summary of the evidence, and express findings of the highest and best use of the land, both before and after the taking as ordinary farm land, value of land taken in fee, severance damage, value of easements, and total just compensation, and that market value at time of taking governed, when the cases involved the single use of farm land, and no underlying factor materially affecting the ultimate issue was involved, and the commission was given specific instructions by the Trial Court as to the rules of law applicable thereto, in order to permit an intelligent review by a Court of Appeals?

(b) (1) Whether particular inadequacies in such a commission's report must be specified by specific ob-

jections to the report under Rule 53 (e) (2) in order to present a question for review by a Court of Appeals? and, (2) where no claim of excessiveness is made, is the failure to make findings, if normally required, harmless error? and,

(c) Whether a Court of Appeals in remanding a case for additional findings should specify the particular inadequacies on which findings must be made.

### **STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED.**

The Federal Rules of Civil Procedure involved are Rules 52 (a), 53 (e) (1) (2) and 71A (h) which are set forth verbatim in the Appendix hereto at page 35.

### **STATEMENT.**

Respondent filed actions to condemn the lands of Petitioners along with others. The District Court referred all of the cases to a Commission (R. 18) under specific instructions. (R. 21.) No objections or exceptions were taken to this order by any party. The Chairman of the Commission was an experienced attorney. (R. 25.) The Commission visited each tract to view the lands condemned. The Commission entered their reports after conducting full-scale court trials of the issue of just compensation. These three cases involved ordinary farm land. No other use was involved under the evidence. The only unusual features involved in the three cases which could have materially affected the ultimate finding of just compensation:

(1) In the *Lindsey* case, where the landowner contended for severance damage to his homeplace located several miles from the tract taken as to which the Commission made an express finding rejecting this contention. (R. 38, Finding of Fact No. 3), and

(2) The contention of the landowner in the *Watson* case that the land was valuable for subdivision purposes which also was expressly rejected by the Commission. (R. 43.)

The reports of the Commission (R. 32-40, *Lindsey* case; 41-49, *Watson* case; and 89-99, *Gibson* case) contain a summary of the evidence for both parties, Findings of Fact including highest and best use, severance damage, fair market value of land taken and flowage and other easements and sum total of just compensation, and concluded that the fair market value of land taken at time of taking was the standard for determining just compensation. Pursuant to Rule 53 (e) (2), Respondent filed objections to the reports (R. 50, 52, 100) complaining that the reports did not "contain sufficient findings as to the matters on which the Commissioners based their valuation", and that the awards were "excessive, outside the range of proper testimony", and "outside the range of market value and therefore clearly erroneous". The District Court adopted and approved the reports. (R. 55, 56, 102.) Respondent subsequently on appeal specified as error the District Court's "approving . . . the reports of the Commissioners when the findings were inadequate to determine the basis on which the awards were made",

and "when the reports themselves show that there were conflicts in the evidence but do not show how the Commissioners resolved them in making the awards". (R. 108), thereby abandoning the claim of excessiveness. The Court of Appeals reversed the judgments and remanded the cases for resubmission in order that the reports might meet the standards prescribed in its opinion, namely, that the Commission find which evidence it credited and which evidence it discredited. There were conflicts in the evidence in each case as would be expected in any trial, but *only* in the witnesses' opinions of fair market value. Each of the Petitioners introduced sales which they contended to be comparable as independent evidence; Respondent introduced evidence of sales which it contended to be comparable only as a supporting basis for their expert's opinion of fair market value. The only conflicts in position between Petitioners and Respondent during the trials were. (1) conflicts in opinion of market value, and (2) conflicts as to whether sales introduced in evidence by Petitioners were comparable.

The only questions before the Court of Appeals for the Fifth Circuit were:

- (1) Whether the general objection to the Commissioner's awards, namely, that the reports did not contain sufficient findings as to the matters on which the Commissioners based their valuation was sufficiently specific to raise any question for review, particularly where no complaint was made as to the

excessiveness of the awards. The opinion of the Court of Appeals did not decide this question but assumed that this general objection was sufficient.

(2) Whether the findings of fact were sufficient to sustain the judgments or whether the judgments should be vacated and the cases remanded for more specific findings. The Court of Appeals, while noting no specific inadequacy of the findings of fact, made general observations which it concluded rendered the findings inadequate to permit an intelligent review. (R. 116-117, 121-122, see fourth, ninth and tenth paragraphs of Opinion.)

Petitioners' Petition for Rehearing was denied on January 3, 1963. Petitioners then filed this application within the time provided by law.

### **REASONS FOR GRANTING THE WRIT.**

1. **Proper Construction and Application of Rules 52 and 53 to Condemnation Commissions Is Clear and Impelling Reason For Grant of Writ.**

This Court has granted certiorari in several cases involving the construction and application of the Federal Rules of Civil Procedure. With the tremendous number of condemnation cases now filed by the United States, a clear ruling by this Court on what constitutes adequate findings of fact by a condemnation commission would (a) resolve conflicts in principle and application of these rules in lower court federal decisions,

(b) greatly enhance the utility of a commission for expeditious determination of condemnation suits, and (c) put to rest the question of whether Rule 52 requires a judge or master to make findings on the evidence in order to permit intelligent review. We have found no decision of this Honorable Court on the particular questions presented. While this Court in *Kelley v. Everglades Drainage District*, 319 U.S. 45 (4), 63 S. Ct. 1141, held that the nature and degree of exactness of findings depends on the circumstances of the particular case and delusive exactness is not required, the opinion of the Fifth Circuit Court of Appeals has held that a commission, in the simplest of condemnation cases, with only evidentiary conflicts in opinions of value, must in its findings indicate the very evidence on which it based its award and how it reached its decision. This holding is an extreme interpretation of Rules 52 and 53, unsupported by reason or authority, which casts a cloud upon the purport and application of these rules.

**2. Opinion Is In Head-On Conflict With Decisions of the Court of Appeals for the Ninth and Tenth Circuits On Identical Question; Is Contrary to Decisions Within the Court of Appeals for the Fifth Circuit, and Is Opposed to Numerous Decisions of Other Circuits.**

(a) Findings as to component elements, not evidence, of ultimate issue is contemplated by Rules 52 (a) and 53 (e) (2).

At the outset, we recognize there may be cases requiring express findings on underlying facts which are

of the essence of, and upon which, an ultimate fact or issue depends, without which an intelligent review under the clearly erroneous rule could not be reasonably performed. Such cases are *Kelley v. Everglades Drainage District*, 63 S. Ct. 1141, 320 U. S. 214 in which there was no determination of the priorities of different classes of creditors to different sources of revenue, and the extent to which each class was entitled to participate in each source so that the ultimate fairness of the plan of reorganization could not be tested; and *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 80 A.S. Ct. 1190, in which this court held that an unelaborated conclusory finding of a "gift" which was the ultimate issue did not comply with the requirements of Rule 52 (a) since it did not give the reviewing Court any indication whether the trial court reached that conclusion because (a) of the form of the resolution authorizing the transfer, or (b) the absence of legal consideration was conclusive, or (c) some other reason. It is well settled that a gift involves the component elements of donative intent, delivery and acceptance and Rule 52 (a) requires a finding on subsidiary or underlying facts which are of the essence of the ultimate fact conclusion by the trial court. This case required a finding on an element of the ultimate issue; not a finding on the evidence which led to the conclusion as to this underlying element of the ultimate issue.

(b) Decision is directly contra to Ninth and Tenth Circuit decisions on identical question.

The opinion sought to be reviewed recites (R. 120) that it is at variance with the view adopted by the Court of Appeals for the Tenth Circuit in *United States v. Merz*, 306 F. 2d 39, (3) (4), pp. 41-43 (July, 1962), where that Court, in a case almost identical with the instant cases, rejected the identical general contentions of Respondent made in the instant cases. It is manifest that this is so from a reading of the facts set forth in that decision.

The opinion sought to be reviewed then seeks support in the decision of the Court of Appeals in *United States v. Lewis*, (July, 1962) 308 F.2d 453, 458, which required specific findings of the highest and best use of the land taken, where the evidence showed a conflict as to whether it was more valuable for (1) agricultural purposes, or (2) sand and gravel deposit, and how the sand and gravel deposit was figured in determining the value of the land. The Ninth Circuit followed the closely analogous decision of the Court of Appeals for the Fourth Circuit in *United States v. Carroll*, (June, 1962) 304 F. 2d 300, in arriving at its decision. The latter decision of the Fourth Circuit followed its previous decision in *United States v. Cunningham*, (1957) 246 F. 2d 330.

The case of *U.S. v. Lewis*, 308 F. 2d, 453, upon which the Fifth Circuit Court of Appeals relied, is distinguishable. There, the evidence showed a conflict of position by the parties as to the highest and best use of the land, namely, whether the sand and gravel deposit contributed to the market value of the land. No finding was had as to this material conflict of position which required a

subsidiary finding, since it materially affected the ultimate issue of value.

The same distinction applies to *United States v. Cunningham*, (4th, 1957) 246 F. 2d 330, *Cunningham v. United States*, (4th, 1959) 270 F. 2d 545 (multiple uses), *United States v. Bell County*, (5th, 1958) 259 F. 2d 23 (consequential benefits), *United States v. Leavell & Ponder, Inc.*, (5th, 1961) 286 F. 2d 398 (need for replacing cash reserves for short-lived equipment in a complex Wherry-Housing lease condemnation) and *United States v. Buhler*, (5th, 1958) 254 F. 2d 876 (multiple uses and demand for peculiar property, namely an airfield). We note that this distinction was adopted by the Ninth Circuit in *Merz*, 306 F. 2d 39, 42-43.

In the instant cases the reverse is true. There was no conflict as to the highest and best use of the land, and under the *Kelley* case, *supra*, no necessity for subsidiary findings to permit an intelligent review under the clearly-erroneous rule.

The opinion sought to be reviewed (R. 120) quotes the Ninth Circuit's conclusion in the *Lewis* case, *supra*, stating that it agreed with the Fourth Circuit's decision in the case of *United States v. Cunningham*, 246 F. 2d 330, which was a rejection of the contention that no findings of fact are required in a condemnation commission report, and not a holding that such a commission in its report must state what evidence it credited and what evidence it discredited.

What the Court of Appeals for the Fifth Circuit overlooked or ignored was the decision of the Ninth Circuit Court of Appeals in the cases of *United States v. Benning* and *United States v. Morrison*, (July 10, 1962) 308 F. 2d 453, at 460, which cases, like the instant cases, dealt with a single highest and best use, and which decision again rejected the identical contentions made by Respondent in the instant cases, but which the opinion of the Fifth Circuit adopts as sound. The decision in the last cited cases is in entire accord with the *Merz* case, *supra*. Its language is so significant that we beg the Court's indulgence to quote its fluent language, particularly since the Fifth Circuit chose to ignore the impact of the holding. (R. 131.)

"(7) The objections of the United States in these cases seem to be directed to the fact that the findings and report do not disclose what proof the commission relied on and why the commission chose to believe certain witnesses and accept certain evidence as more credible than other witnesses and other evidence. Findings need not be so comprehensive. They should, as the United States asserts, show 'how' material factual disputes relating to value have been resolved. But this requirement relates to a showing of the result—the fact as found—and not to a detailed itemization of the proof relied upon in order to reach that result. We conclude that the findings and report in each case are sufficient."

*United States v. Lewis*, 308 F. 2d 453, 460.

The case upon which the Court of Appeals for the Fifth Circuit cites in its support itself repudiates the very holding made in the instant cases.

### **3. Decision is Contrary to Other Decisions of Court of Appeals for the Fifth Circuit.**

In requiring finding as to what evidence was credited and discredited, the decision sought to be reviewed is contrary to the following decisions of the same Court construing and applying Rules 52 (a) and 53 (e) (2).

"(8, 9) The Government complains that the Commission and the court failed to make explicit findings with respect to a number of questions which it asserts are decisive. The Commission found that there was a dispute as to termite damage and that such damage was inconsequential at the time of taking. The finding is challenged and the Government contends that the Commission committed error in failing to include in its appraisal computation an amount for termite control. The Government asserts that there must be a reversal because the Commission concluded that leasehold furniture should be regarded as a short-lived facility, beneficial to the utilization of the leasehold, and consideration should be given to its effect on the gross income from the leasehold and to the financial burden of necessary replacements. In the consideration of these and other contentions of the Government, we must not forget that the ultimate determination is to be of an amount to be awarded as just compensation to the owner of property taken by the sovereign. The measure of the award is in many, perhaps most, instances based upon opin-

ions. The amounts to which the expert appraisers testify, the amount fixed by jurors or commissioners, and the amount determined by the court are all opinions and, as has been said, an informed guess. *United States v. Miller*, 317 U.S. 369, 63 S. Ct. 276, 87 L.Ed. 336. The judicial determination of the award in a condemnation case cannot be made by mechanical or mathematical processes, nor can the process of adjudication be governed by a fixed formula. *United States v. Cors*, 337 U.S. 325, 69 S. Ct. 1086, 93 L.Ed. 1392. We do not think it is necessary that we require, in testing the district court's judgment by the clearly erroneous doctrine, a specific finding with respect to each of the evidentiary conflicts that appear in the record. Cf. *Seale v. United States*, 5 Cir., 1957, 243 F.2d 145. We do not believe that the court omitted findings on any essential factual issues so as to prevent this Court from determining whether the result was based upon clearly erroneous findings." (Emphasis ours).

*United States v. Tampa Bay Garden Apartments, Inc.*, 294 F.2d 598, 606, 5th Cir., 1961.

"A trial court may not be put in error for failure to reveal the method employed in calculating the amount of damages awarded since the method of assessing unliquidated damages in any case is not required to be revealed by a trier of facts, either court or jury." (Emphasis ours.)

*Ginsberg v. Royal Ins. Co.*, 179 F.2d 152 (3), 5th Cir., 1950.

"Findings of the trial court are to be construed liberally in support of the judgment, even though they are not as explicit or detailed as might be desired."

*The Travelers Insurance Company v. Dunn*, 228  
F 2d 629, 630 (1), 5th Cir., 1956..

"(1-3) We have no means of knowing the basis of the judgment, whether the district court found unseaworthiness or negligence or both, or in what either or both consisted."

*Victory Towing Company, Inc. v. Bordelon*, 219  
F 2d 540, 541, 5th Cir., 1955.

This case best illustrates what Petitioners' contend are "underlying facts" on which findings are required, as contrasted with findings on evidence or reasoning thereupon or the process by which a trier of fact arrives at its conclusion, which are not required to set forth in findings.

"In action to recover unpaid balance upon agreed purchase price for capital stock of transportation line sold by plaintiffs, wherein defendants contended corporation was insolvent when sold, contrary to representation of solvency, finding of solvency was sufficient, *without* statement of assets and liabilities going to illustrate solvency. Fed. Rules Civ. Proc. rule 52, 28 U.S.C.A.

"In action to recover unpaid balance upon agreed purchase price for capital stock of transportation line sold by plaintiffs, wherein defendants alleged plaintiffs made certain fraudulent representations, finding that fraudulent representations were not made as alleged would be sufficient *without* referring to each separate representation and making subsidiary findings as to it. Fed. Rules Civ. Proc. rule 52, 28 U.S.C.A.

"Federal district court need not make findings on all facts presented nor make detailed evidentiary findings, nor make findings asserting negative of each issue of fact raised, and ultimate test as to adequacy of findings is whether they are sufficiently comprehensive and pertinent to issues to provide a basis for decision and are supported by evidence. Fed. Rules Civ. Proc. rule 52, 28 U.S.C.A." (Emphasis ours.)

*Weber v. McKee*, 215 F 2d 447, 448 (4) (5) (6),  
5th Cir., 1954.

"Oral findings that plaintiff, who brought suit against the government under the Federal Tort Claims Act, had a pre-existing defect in the formation of his lower back, and that such condition was aggravated at time of collision, and that he was permanently partially disabled, were sufficient to provide a basis for award of damages, and did not violate rule requiring special findings, even though no special findings were made with regard to plaintiff's other physical conditions and their effect on his pain, suffering, impairment of earning capacity and need for future medical care. Fed. Rules Civ. Proc. rule 52 (a), 28 U.S.C.A.

"The findings of fact were stated orally at the trial. No exception has been taken to the form in which the findings were made. These findings, the Government contends, violate Rule 52 (a). Fed. Rules Civ. Proc. 28 U.S.C.A. in that no special findings were made with regard to Jacobs' other physical conditions and their effect on his pain, suffering, impairment of earning capacity and need for future medical care. We think the findings are ample to provide a basis for the decision. Kelley

v. Everglades Drainage District, 319 U.S. 415, 63 S. Ct. 1141, 87 L.Ed. 1485, 1486; Weber v. McKee, 5th Cir. 1954, 215 F.2d 447. This being so, we see no error."

*United States v. Jacobs*, 308 F.2d 906 (2) 907, 5th Cir., 1962.

"Where only issue on appeal was one of fact, and reviewing court could not determine that judgment of trial court approving findings of special master was clearly erroneous, judgment would be affirmed."

*Leonard M. Bernes v. Edward J. Henning*, 310 F.2d 127, 5th Cir., 1962.

It appears, therefore, that the different views on the requirements of Rules 52 (a) and Rule 53 (e) (2) even within the same Court make for inconsistent results. Petitioners respectfully submit this fact as an additional reason for the grant of the writ.

#### 4. Decision Is Contrary to the Weight of Authority of Other Circuits in Requiring Detailed Evidentiary Findings.

In addition to cases of the Ninth and Tenth Circuit decisions, and the Fifth Circuit decisions above cited, which are contrary to the decision sought to be reviewed, numerous other Circuits affirm the general rule that findings under the Rules do not require a Court to state whether it credited or discredited evidence or to set forth the process by which it arrived at its ultimate finding. Particularly is this rule applicable to

findings of unliquidated damages, or fair market value which is at most "an informed guess" and is not and cannot be fixed by any definite formula, as this Court has stated. The following authorities sustain the principles that (1) detailed evidentiary findings are not required, and findings on the ultimate issues are sufficient when there is no peculiar underlying fact or issue which materially affects the ultimate judgment, and (2) a trier of fact is not required to reveal the method used by it in arriving at the ultimate award.

### FIRST CIRCUIT.

1. *United States v. Grigalauskas*, (1st, 1952) 195 F. 2d 494 (3, 4) 498.

### SECOND CIRCUIT.

1. *Petterson Lighterage & Towing Corporation v. New York Central R. Co.*, (2nd, 1942) 126 F.2d 992 (5, 6) 996, 997.

2. *A. B. Dick Co. v. Marr*, (2nd, 1946) 155 F. 2d 923 (10) 924.

3. *United States v. Vater*, (2nd, 1958) 259 F. 2d 667 (8) 668.

### THIRD CIRCUIT.

1. *United States v. 6.87 Acres of Land in Village of Garden City, Nassau County, N.Y., et al.*, (2nd, 1945) 147 F. 2d 351 (1) (5) 352.

2. *Hartford-Empire Co. v. Shawkee Mfg. Co., et al.*, (3rd, 1944) 147 F. 2d 532 (3) (4) (5) 533.

3. *O'Toole v. United States*, (3rd, 1957) 242 F. 2d 308 (4) 310.

4. *Blumenthal v. United States*, (3rd, 1962) 306 F. 2d 16 (1).

#### FOURTH CIRCUIT.

1. *Knapp v. Imperial Oil & Gas Products Co.*, (4th, 1942) 130 F. 2d 1 (3).

2. *United States v. Pendergrast*, (4th, 1957) 241 F. 2d 687 (1-4) (5) 689.

3. *Cunningham v. United States*, (4th, 1959) 270 F. 2d 545, 550.

#### SIXTH CIRCUIT.

1. *Huszar v. Cincinnati Chemical Works, Inc.* (6th, 1949) 172 F. 2d 6 (1).

2. *Elam v. United States*, (6th, 1958) 250 F. 2d 582 (2).

#### SEVENTH CIRCUIT.

1. *Toledo, P & W R. R., et al. v. Peoria & P. Union Ry. Co.*, (7th, 1934) 72 F. 2d 745 (5).

2. *Gay Games, Inc. v. Smith*, (7th, 1943) 132 F. 2d 930 (1).
3. *Shapiro v. Rubens*, (7th, 1948) 166 F. 2d 659 (19) 661.
4. *Oedekerck, et al. v. Muncie Gear Works, Inc.*, (7th, 1950) 179 F. 2d 821 (1).
5. *Norwich Union Indemnity Co. v. Haas, et al.*, (7th, 1950) 179 F. 2d 827 (8) (9) 828.
6. *Life Savers Corporation v. Curtiss Candy Co.*, (7th, 1950) 182 F. 2d 4, 7.

#### EIGHTH CIRCUIT.

1. *McGee v. Nee*, (8th, 1940) 113 F. 2d 543 (5) 546.
2. *Brown Paper Mill Co., Inc. v. Irwin*, (8th, 1943) 134 F. 2d 337 (1).
3. *Skelly Oil Co. v. Holloway, et al.*, (8th, 1948) 171 F. 2d 670 (1).

#### NINTH CIRCUIT.

1. *Carr v. Yokohama Specie Bank, Limited, of San Francisco, et al.*, (9th, 1952) 200 F. 2d 251 (3) (4) (5).

#### TENTH CIRCUIT.

1. *Trentman v. The City and County of Denver, Colorado*, (10th, 1956) 236 F. 2d 951, 953.

2. *United States v. Horsfall*, (10th, 1959) 270 F. 2d 107 (5).

### DISTRICT OF COLUMBIA.

1. *Klimkiewicz v. Westminster Deposit & Trust Co., et al.*, (D.C., 1941) 122 F. 2d 957 (2) (3).
2. *Schilling, et al. v. Schwitzer-Cummins Co.*, (D.C., 1944) 142 F. 2d 82 (4) (5) (6), 84.

### SECONDARY AUTHORITIES.

1. *Moore's Federal Practice*, § 52.05-06, pp. 2643-2661.
5. **Decision Confuses Fact With Evidence, Is Illogical in Principle, and Impossible of Reasonable Application.**

The Advisory Committee which formulated Rule 52 stated that "the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration of detail or particularization of facts".

The opinion sought to be reviewed confuses fact with evidence.

"Opinion evidence is not evidence of fact. The trier of fact is not bound to follow the expert."

*United States v. Honolulu Plantation Co.*, (9th, 1950) 182 F. 2d 172, 178.

The decision sought to be reviewed says in one breath that it is not necessary that every contested

issue be resolved by a separate finding of fact, and in the next breath says that there must be sufficient findings of subsidiary facts so that it will appear to the reviewing Court that the ultimate award was "soundly and legally based". This is an erroneous statement of the rule. The true rule is that findings are necessary only to indicate the factual basis so as to determine if the ultimate judgment is clearly erroneous under the presumption of correctness.

Next, what evidence the trier of fact credited and discredited is not an underlying fact of the ultimate conclusion; it is the process by which it arrived at its conclusion. The same applies to the criticism that the reports did not indicate whether its ultimate conclusion was based on opinions that were based on comparable sales. Further, whether indicated sales were truly comparable is itself a conclusion from the evidence after weighing many factors and not the underlying factual basis referred to by this Court. Assuming that a particular sale is comparable to the tract being condemned, it does not follow that it is identical, and its weight is for the trier of fact, analogous to the credit or discredit of opinion evidence. Next, the decision prejudices the qualifications of the witnesses without the Court reading the transcript or the matter even being involved. Finally, the decision erroneously requires the Commission to state that it not give weight to what might be construed as a misconception of market value.

Findings upon the evidence do not constitute compliance with Rule 52 (a). It is not contemplated by this Rule.

"A discussion of portions of the evidence and the District Court's reasoning in its opinion do not constitute the special and formal findings by which it is court's duty appropriately and specifically to determine all issues presented, and are not a compliance with equity rule requiring fact findings and conclusions of law to be stated. Equity Rule 70-1/2, 28 U.S.C.A. following section 723." (Emphasis ours.)

*Interstate Circuit Inc. v. United States*, (1938) 304 U.S. 55, 58 S. Ct. 768 (3).

Neither does the rule require the assertion of each rejected proposition. *Schilling v. Schwitzer-Cummins Co.*, 142 F. 2d 82.

This Court stated in the *Kelley* case, *supra*, that the findings must indicate the "factual basis for the ultimate conclusion". Opinion evidence of value is not the "factual basis" to which this Court referred. Likewise the Petitioners' comparable sales in the *Lindsey* and *Gibson* cases (none introduced in *Watson* case) were only evidence of value, and not the underlying factual basis for the Commissioner's awards, as to which findings must be made. It was for the Commission to decide what weight should be given to the comparable sales evidence in the same fashion that it was their prerogative to weigh the opinion evidence of value, in conjunction with their visits to the land.

"The report of the commissioners indicated that a personal view of the lands had played an important part in arriving at what constituted a proper award. The weight to be given to this factor as against opinion evidence is exclusively for the trier of the facts." (Emphasis ours.)

*Rapid Transit Company v. United States*, (1961),  
295 F. 2d 465, 467.

Presumably, if the decision sought to be reviewed is correct, the Commission would be required in its findings to specify just what weight its views of the land played in their ultimate decision. This had not been heretofore held and we submit that such is an erroneous view.

The decision is illogical in principle, impossible in application and prescribes no definite standards by which a Commission might comply, assuming it were otherwise correct.

The error of the decision sought to be reviewed is all the more unreasonable in its application. It requires a commission to state that it believed witness X, that it disbelieved witness Y, and discredited witness Z some percentage. It must find that comparable sale X was comparable, sale Y was not comparable, sale Z was partially comparable. If the law requires this, then it must likewise require that the commission state why it believed one witness, and disbelieved another and discredited another by a certain percentage. This view overlooks the independence of the fact-finder to weigh the evidence and arrive at its own conclusion of

value. A commission may not, as such, discredit any witness or other evidence; its ultimate finding is generally an independent impression from all the evidence, derived from weighing all the evidence in the light of the commission's actual view of the land.

The opinion concludes that "in order that the commissioners' reports may meet the standards here prescribed, the judgments are reversed for resubmission to the commission". No standards are prescribed in the entire opinion. The opinion fails to point to a specific inadequacy, which is essential in order that the commission might comply therewith. Specific directions as contained in *U. S. v. Lewis*, 308 F. 2d 453, at page 458, are absent.

The opinion further erroneously requires a finding by the Commission that it did not base its opinion on a claimed incorrect theory of market value reflected by evidence admitted without objection, even in face of the express conclusion of law of the Commission that just compensation meant fair market value at time of taking, which was incorporated in Instructions to Commission. (R. 121-122.)

This is contrary not only to the Commission's express conclusion of law that "fair market value at the time of taking" must govern, but also unreasonably imputes to the Commission a violation of the Instructions given to them by the Trial Court. This is opposed to both reason, authority, the presumption of correctness of findings, and the established rules of construction of

findings reflected in numerous decisions, including a prior decision of the Court of Appeals for the Fifth Circuit. These authorities support the statement found in Moore's Federal Practice that:

"Findings of the trial court 'are to be construed liberally in support of a judgment or order . . . Whenever, from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn.'"

5 Moore's Federal Practice, pp. 2660, 2661.

To same effect, *The Travelers Insurance Company v. Dunn*, 228 F. 2d 629, 630 (1) (5th Cir., 1956).

Findings are presumptively correct.

"Fact that triers of fact totally reject an opposed view impeaches neither their impartiality nor the propriety of their conclusions.

"Federal rule providing that findings of fact shall not be set aside unless clearly erroneous 'applies to appeals by the government as well as to those by other litigants. Federal Rules of Civil Procedure, rule 52, 28 U.S.C.A."

*United States v. Yellow Cab Co.*, 70 S. Ct. 177 (1) (2), No. 22, 1949.

To same effect: *Zimmerman v. Montour Railroad Company, Inc.*, 296 F. 2d 97 (2) (3) (4), 3rd Cir., 1961.

*Blumenthal v. United States*, 306 F. 2d 16 (1), 3rd Cir., 1962.

*Switzer Brothers, Inc. v. Locklin*, 297 F. 2d 39, 45,  
7th Cir., 1961.

*United States v. Foster*, 123 F. 2d 32 (1), 9th Cir.,  
1941.

*Glens Falls Indemnity Company v. United States*,  
229 F. 2d 370 (1) (2), 9th Cir., 1955.

*Stone v. Farnell*, 239 F. 2d 750, 752 (18) (19), 757,  
9th Cir., 1957.

*Stone v. Farnell*, 239 F. 2d 750, 757, 9th Cir., 1957.

The Commission made a summary of the evidence. It did not so much as mention the testimony referred to. (R. 122.) There is no basis for inferring that the Commission did not understand basic principles of eminent domain law. The opinion of the Court of Appeals does just that. A casual reference to the Commission's summary of the evidence that the Commission did set forth the evidence on which it based its award.

Next, the opinion holds that the reports are inadequate because they "did not indicate to what extent it gave credence to the opinions of witnesses, who, according to the summary of evidence given in the reports themselves, had little or no familiarity with" fair market value. (R. 117.)

Adequate findings of fact do not require that a Commission set forth the qualifications of each witness. No other case has gone that far. The opinion sought to be reviewed implies, in fact, holds to the contrary. No objection to any witness's testimony for lack of

qualifications to testify as to value was made. Had the Court of Appeals reviewed the transcript, which it obviously did not, (R. 122) it would have found ample qualifications for each particular witness. If the witness's opinion was subject to being stricken on motion as being based on an incorrect understanding of "fair market value", there was no complaint of any adverse ruling on any such motion. The basic error of the reasoning of the opinion is the refusal to apply the well-settled principles of law cited herein applicable to findings by a master.

**6. No Reviewable Question Was Presented by the Appeal, and Opinion Fails to Prescribe Standards by Which A Commission Might Comply With Demand for Findings.**

On the second question presented, there appears a conflict in the authorities as to whether specific objections to a master's report under Rule 53 (e) (2) are necessary to present a reviewable question. The only objection filed by Respondent and insisted upon on appeal was the objection that the report did not contain sufficient specific findings as to the matters on which the Commissioners based their valuation. This is no objection whatever. It points to nothing. It is so general that a trial court would be unable to determine to what insufficiency Respondent was referring. The Court of Appeals for the Fifth Circuit in the opinion sought to be reviewed did not refer to the point.

"Exceptions to a master's report should point out specifically the errors relied upon; and they need

not be considered if they are so broad as to amount merely to a denial of the facts and conclusions of the master, so as to require the court to rehear the entire case." (Emphasis ours.)

*Sheffield & Birmingham Coal, Iron & Ry. Co. v. Gordon*, 151 U.S. 285 (3), 14 S. Ct. 343.

To same effect, *Coghlan v. South Carolina R. Co.*, 142 U.S. 101, 12 S. Ct. at 154.

"Master's findings cannot be reviewed upon appeal in absence of exceptions to his report and in absence of objections to court's approval of master's findings. Federal Rules of Civil Procedure, rule 53 (e) (2), U.S.C.A. following section 723c."

*Socony-Vacuum Oil Co. v. Oil City Refiners*, 136 F. 2d 470, 471 (17), 6th Cir., 1943.

To same effect, *Massachusetts Bonding & Ins. Co., v. Preferred Automobile Ins. Co.*, (6th, 1940) 110 F. 2d 764 (1). (2).

"It is not necessary to make objections to the master's findings as permitted by the rule. Fed. Rules Civ. Proc. rule 53 (e) (2), 28 U.S.C.A."

*Henry Hanger & Display Fixture Corporation of America v. Sel-O-Rak Corporation*, 270 F. 2d 635, 636 (11), 5th Cir., 1959.

"Objections to the master's report have been likened to special demurrers and to assignments of error in appellate proceedings, but in any event it is clearly established that they must specifically point out the errors complained of so as to raise well-defined issues for the court's consideration.

Since mere general objections would compel the court to review the whole case, and thus would defeat the very purpose of reference, such vague and general objections should be overruled."

*Moore's Federal Practice, Volume 5, pp. 2970, 2971, § 53.11.*

"The United States appears to urge upon us a sort of supervisory function in this respect and that we deal with the matter in the abstract. It invites us to look at the commission's reports in these cases; to observe that each upon its face fails to measure up to standard; to send the cases back with general instructions that adequate reports be made.

"This course we reject. If there be inadequacies in a particular report, they must be specified by objection to the report. If any case is to be remanded for correction of error in this area, it must be with instructions that by report or finding resolution of some specific dispute be made or some specific inadequacy be remedied. Otherwise, as we view the matter, there could be no end to these litigations." (Emphasis ours.)

*United States v. Lewis, 308 F 2d 453 (2), 456.*

Neither Respondent's objections nor the opinion itself complies with the above quoted part of the *Lewis* case, *supra*, upon which the opinion to a great extent relies. It is for this additional reason clearly erroneous. The statements that:

"We do not say that every contested issue raised on the record before the commission must be resolved by a separate finding of fact. We do say,

however, that there must be sufficient findings of subsidiary facts so that it will appear to the reviewing court that the ultimate finding of value was soundly and legally based." (Emphasis ours.)

*Opinion, p. 8 (R. 121).*

leave the decision much more vague than the reports which it criticizes as fatally defective. The decision specifies no "subsidiary facts" to which it refers and we submit there are none. With due deference to the Court, Petitioners respectfully contend that the opinion and judgment, being a critic, while it need not be perfect, should, at least, point to specific inadequacies as required by the *Lewis* case, *supra*, so that a commission might comply therewith.

Further, the opinion ignores the prior holding of the Court of Appeals for the Fifth Circuit that it reviews the findings and judgment of the district court, not the Commission. *Parks v. United States*, 293 F. 2d 482 (2) (5th, 1961). The nature of the evidentiary findings sufficient to support the Court's decision are for the Trial Court to determine in the first instance in the light of the circumstances of the particular case. *Kelley v. Everglades Drainage District*, 319 U.S. 415, at 422. If the findings were adequate to enable the District Court to apply the clearly erroneous rule, then it would seem that Respondent's burden on appeal would be showing a manifest abuse of its review of the Commission's findings, or a specific harmful error in order to show reversible error.

On the merits, however, if the Court had followed the rules of law cited herein, it could have determined from the reports alone that the Commission's findings were within the range of competent evidence and not clearly erroneous. *Petitioners are entitled to no less.* Looking at the evidence recited in the reports under the presumption of correctness, the only conclusion that can be drawn is that the Commissioners (1) rejected the opinions of Respondent's witnesses and the purportedly comparable sales on which they were based, and (2) did not as such, accept the opinions of Petitioners' witnesses nor find Petitioners' sales to be identical, but arrived at their own independent findings, weighing the evidence in the light of their visits of the land taken. This the Commission had a right to do. The fact that the ultimate awards more nearly approximated the opinions of Petitioners' witnesses, and exceeded the amount initially deposited by Respondent is of no consequence. *Stephens v. United States*, (5th, 1956), 235 F. 2d 468 (7). The Commission's reports show how they resolved the conflicts in the testimony by their end result, as per Merz, reason, and generally accepted principles of law. The rules involved do not require a Commission to set forth the formula or method by which it arrived at its result, when actually there is no formula or method by which just compensation may be determined except fair and honest weighing of the evidence and adherence of the Commissioners to their oaths and the Instructions by the Trial Court.

**7. All General Recognized Bases for Grant of Writ Are Present in the Instant Cases.**

While there is no formula that governs this Court's grant of certiorari except its enlightened judicial discretion, we earnestly submit that this case presents special and important reasons for clarification of the law by this Court on a subject which has constant and recurring use. This Court has recognized that one of its primary functions is to resolve conflicts between decisions of Courts of Appeal so as to provide for uniformity of decision on issues of public consequence. The conflict within the decisions of the Court of Appeals for the Fifth Circuit on the subject is still an additional reason for its grant. The clearly erroneous and extreme interpretation of Rules 52 (a) and 53 (e) (2) is still a further reason. The proper interpretation and application of the Federal Rules of Civil Procedure which has daily application in all non-jury cases is such a subject as merits this Court's final say.

**CONCLUSION.**

For the reasons submitted above, it is respectfully submitted that the writ of certiorari should be granted.

W. LOWREY STONE,

JESSE G. BOWLES,

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Attorneys for Petitioners.

**CERTIFICATE OF SERVICE.**

I, FORREST L. CHAMPION, JR., one of the attorneys for Petitioners in the foregoing cases, and a member of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of ....., 1963, I served copies of the foregoing Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit on the United States of America, Respondent, as follows:

1. By mailing a copy thereof in a duly addressed envelope with adequate postage prepaid to the following named parties at the addresses set forth below:

Mr. Ramsey Clark,  
Assistant Attorney General,  
Washington, D. C.,

Messrs. S. Billingsley Hill and Hugh Nugent,  
Attorneys, Department of Justice,  
Washington, D. C.,

Mr. Floyd M. Buford,  
United States Attorney,  
Macon, Georgia.

and, by mailing a copy of the same in a duly addressed envelope, with air mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

Attorney for Petitioners,  
Post Office Box 1975,  
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